4-21-1976

Keith Alan Roberts, by and through his next friend, Phyllis Roberts v. Joey Horne and Linda Tolen

Appellee's Brief 1976-SC-0193

APPELLEE'S BRIEF

332 S.W.2d cert

SUPREME COURT OF KENTUCKY

File No. 76-193

KEITH ALAN ROBERTS, by and through his next friend, PHYLLIS ROBERTS - - Appellant

versus

JOEY HORNE and LINDA TOLEN - - Appellees

Appeal from McCracken Circuit Court

BRIEF FOR APPELLEES

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This is to certify that a copy of the brief for appellees has been served by mailing a copy of same to James W. Owens, Chartered, 629 Washington Street, Paducah, Kentucky 42001 and Hon. Lloyd C. Emery, II, McCracken Circuit Court, Division I, Paducah, Kentucky 42001, present Division I trial judge, pursuant to RAP 1.250 this 20 day of April, 1976.

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TABLE OF CONTENTS AND AUTHORITIES

STATEMENT OF THE QUESTIONS PRESENTED

Different questions are involved than those presented by appellant.

Had appellee, Joey Horne, been drinking alcoholic beverages to the extent that his ability to drive was affected and did appellant, Keith Alan Roberts, who was riding with appellee, know it or should he have known it?

SUPREME COURT OF KENTUCKY

File No. 76-193

KEITH ALAN ROBERTS, by and through his next friend, PHYLLIS ROBERTS - *Appellant*

v.

JOEY HORNE and LINDA TOLEN - - *Appellees*

APPEAL FROM McCRACKEN CIRCUIT COURT

BRIEF FOR APPELLEES

COUNTERSTATEMENT OF THE CASE

On May 18, 1973, an accident occurred on Riepe Ridge Road, Massac County, Illinois (TR. 3). Joey Horne, hereinafter "appellee" was the driver of the vehicle and Keith Alan Roberts, hereinafter "appellant," was a passenger in the front seat (Horne [H] 8). The accident happened at approximately 8:00 or 8:30 p.m. but the circumstances leading to the accident started several hours earlier.

Appellant and appellee had been working on appellant's car in Paducah, Kentucky (Roberts [R] 4). In appellee's car, the two boys went to get some cigarettes for appellant (R, 5). Appellant testified that after they had secured the cigarettes,

"Joey asked me if I wanted to drink a little beer and I said yes."

The two had been drinking together on at least two prior occasions (R, 5). Appellant had drunk beer at other times when his mother would leave him some at home (R, 5). They drove to Metropolis, Illinois and stopped at a pool hall (R, 6). The two boys disagreed on how much beer they purchased. Appellee stated he, appellant and Terry Green then went and picked up three cartons of beer (H, 5). Appellant testified that appellee and two other fellows went to get two cases of beer, twenty-four (24) bottles to the case, and brought it back to the pool hall and then picked up appellant (R, 6, 7, 8). With appellee driving and appellant and Terry Green as passengers, the boys proceeded out Riepe Ridge Road where they stopped for the drinking party. They arrived at approximately 6:00 or 6:30 p.m. and stayed almost two hours (H, 5). Some other boys arrived and they, too, brought beer (R, 10).

Appellant and appellee were together the whole time, since they were not familiar with the other boys (R, 11). They did not ice the beer, but drank it from the cartons (R, 9). In describing drinking activities, appellant stated:

"Q. I guess everybody there was drinking beer all the time, weren't they?
A. Yes" (R, 13).

Appellant testified that he and appellee began drinking beer about the time they built the fire (R, 11).

Appellant stated that someone came up with a joint of marijuana, but he did not remember if appellee smoked it or not, but did not believe he did (R, 11).

In response to how many beers he drank in this two hour period, appellant observed:

> "Four, five, six. I really don't know" (R, 12).

However, he admitted:

> "I think I drank a little bit more than I held . . ."

Appellee said that he and appellant had "five or six or about a six-pack of beer each" (H, 18, 19).

Appellee and appellant were together the whole evening and appellee described their condition as

> "Same as everybody else, I guess, beginning to get drunk" (H, 9).

Appellant testified that he became tired and went and got into appellee's car (R, 12). Appellee stated that appellant was awake and talking as they left the other boys at the drinking party (H, 8). They proceeded about a quarter of a mile from the drinking party when they stopped and picked up Charles Rankin, who got into the back seat (H, 8).

Riepe Ridge Road was a newly blacktopped road and the weather conditions were dry. At the time of the accident, appellant was lighting appellee's cigarette and appellee failed to negotiate a curve and ran off the road (H, 9).

Appellant remembers very little about the accident but does remember seeing a tree prior to the wreck

(R, 15). When asked why his memory was so vague, appellant stated:

> "Q. You don't know whether you talked to the others in the car or not?
> A. No. Like I said, I drank a little more beer than I should have."

Bobby Elam, one of the boys at the drinking party, drove up shortly after the accident (H, 13). Elam and his buddies got out of Elam's car. Appellant then took Elam's car. Later that evening, appellant wrecked the Elam Vehicle (R, 17; H, 13-14). Appellant stated that he remembers very little about his excursion with the Elam vehicle (R, 17, 18).

Appellee filed a motion for summary judgment. The trial judge, after reviewing the entire record, sustained appellee's motion for summary judgment, holding appellant contributorily negligent as a matter of law.

ARGUMENT

Appellee, Joey Horne, Had Been Drinking Alcoholic Beverages to the Extent That His Ability to Drive Was Affected and Appellant, Keith Alan Roberts, Who Was Riding With Appellee, Knew or Should Have Known It.

Biddle v. *Biddle,* Ky., 414 S. W. 2d 136 (1967) is directly in point. Galen Biddle ran off the road while operating his vehicle with Russell Biddle as a passenger. They had been drinking beer together for three hours preceding the accident. In each other's company, each had imbibed five or six beers. Russell

Biddle, the passenger, said he felt the driver was capable of driving the motor vehicle. The trial court granted defendant a summary judgment which was affirmed by the Kentucky Court of Appeals, stating:

> "We think the evidence requires the conclusion that Galen was in fact intoxicated in the sense that his ability to operate an automobile properly was adversely affected and his judgment was materially impaired. Cf. Tate v. Borton, Ky., 272 S. W. 2d 333. The best proof is found in the fact that he did not in fact operate his automobile properly nor did he exercise minimal good judgment. . . ."
>
> "Considering all of the circumstances — the quantity of beer consumed and the period of time devoted to it; the close relationship of the two men which would be calculated to give each of them a special knowledge of the other's reactions to alcohol consumption; and the wreck resulting from Galen's inability to operate his automobile safely— we conclude that reasonable men would have to agree that Russell was chargeable with knowledge that it was not safe to ride with Galen, and therefore Russell assumed the risk as a matter of law."

In *Allgeier* v. *Grimes,* Ky., 449 S. W. 2d 911 (1970), the Court granted a judgment notwithstanding the verdict for the driver, citing *Biddle, supra,* and held the plaintiff, passenger, contributorily negligent as a matter of law. David Allgeier was driving a car with Stephen Grimes, age 15, and James Johnson as passengers. They bought some beer and drove around for awhile. They each drank five or six beers. Later that evening they had a wreck . The Court cited *Isaac* v. *Allen,* Ky., 429 S. W. 2d 37, 40 (1968), which states:

> "'. . . The rule followed by the majority seems to be that the question must be left to the jury unless three things are obvious, (1) that the driver had been drinking to the extent that his ability to drive was affected, (2) that the person electing to ride with him must have known it, and (3) that a prudent person faced with the same choice under like circumstances would not have ridden with the driver."

In *Perry* v. *Baker,* Ky., 453 S. W. 2d 607 (1970), both driver and passenger had been drinking. The passenger tapped the driver on the shoulder to talk with him. The driver turned around to talk with the passenger and had a wreck. In citing *Biddle* and *Allgeier, supra,* the Court stated:

> ". . . it is evident that decedent's course of conduct under the circumstances was such as to constitute contributory negligence as a matter of law."

Counsel for appellant argues that since appellant states that he became sleepy because he drank too much, summary judgment should not be granted. He cites three cases in support of his position, none of which are applicable.

In *Thompson* v. *Kost,* 298 Ky. 32, 181 S. W. 2d 445 (1944), Thompson was a driver and Kost and several other people were passengers. They had worked all day and left Louisville around 5:00 p.m. for Cincinnati to attend a meeting. They left Cincinnati after the meeting at approximately 12:00 midnight. They all took one highball with Coke. The Court stated:

> ". . . It is not argued that any of them were under the influence of liquor and the fact that a drink was taken is mentioned only for the reason that it may have had some effect upon defendant becoming sleepy or drowsy at the time of the accident."

Later that evening, there was a wreck. None of the passengers in the vehicle could remember what occurred. The driver told one of the passengers that she, the driver, must have fallen asleep. On the basis of *res ipsa loquitur,* the Court directed a verdict for the plaintiff. The Court of Appeals reversed that decision stating that *res ipsa loquitur* was not applicable. The Court of Appeals held that it was a jury issue as to whether or not the passenger should have realized the *driver* was drowsy. At no time was it stated that the driver was intoxicated and at no time was it stated that the passengers were intoxicated or drowsy.

Appellant cites *Richie* v. *Chears,* Ky., 288 S. W. 2d 660 (1966). Chears was driving a car with Richie as a passenger. Chears became lost and had been driving around for some time. While driving, he told Richie that he was getting sleepy. Richie, the passenger, fell asleep. Later, the driver fell asleep and they had a wreck. There was no evidence of drinking. The Court of Appeals pointed out that this was a different case than one which involves drinking.

> "It appears that in directing the verdict the trial court was guided by Rennolds' Adm'x. v. Waggener, 271 Ky. 300, 111 S. W. 2d 647. The cases, it seems to us, are distinguishable. In the Rennolds case the guest had gotten into the automobile

knowing that the defendant had been drinking intoxicants and was tired from having worked during the day and that he had been up practically all night attending a dance. Moreover, during the course of the trip the driver had cautioned his guests to talk to him and not let him fall asleep at the wheel. The decision that as a matter of law the guest was contributorily negligent in that she had assumed or incurred risk of injury rests on the combination of these circumstances and conditions."

* * * * * * *

"In the case at bar the factor of drinking was not involved at all. The girl did not get into the automobile when the driver showed any sign of drowsiness or under circumstances which even an adult might have anticipated would cause him to go to sleep at the wheel."

Again, this case is clearly distinguishable. There was no drinking. When the passenger got into the car she did not know the driver was sleepy. It in no way involves a sleepy passenger. In the present case, appellant knew at all times that appellee was drinking and he knew at all times how much he was drinking.

The last case cited by appellant is *Chambers* v. *Hawkins,* 233 Ky. 211, 25 S. W. 2d 363 (1930). Mr. Chambers, with relatives and friends had driven from Jellico, Tennessee to visit relatives in Bell County. Along the way, he picked up a guest, Mrs. Hawkins. Close to dark he turned the driving chores over to one of his relatives. Shortly after dark, the relative that was driving failed to make the curve and a wreck occurred. Mrs. Hawkins was injured. The defendant

driver argued that Mrs. Hawkins was contributorily negligent as a matter of law and failed to tell them of the bad curve that was ahead. They stated that she was much more familiar with the road than any of them. The Court pointed out that Mrs. Hawkins was sitting in the back seat and that she was a diminutive, elderly lady, riding at night time, feeling bad and tired and there was no reason for her to feel that she should warn the driver of any condition of the road. This case too is not applicable. There was no drinking. There was no sleeping by the driver or the passenger.

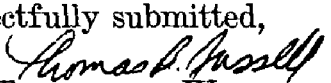
Appellant wants this Court to rule that if a passenger and driver have been on a common drinking venture and the passenger became so intoxicated that he does not remember what happened, or falls asleep, then the passenger is not contributorily negligent as a matter of law, but a jury issue is created. Too much alcohol does not make a jury issue. Appellant cites no case to support his position.

Whether appellant fell asleep because he drank too much or whether he was still awake is not *material*. The case law so indicates. There is no issue that appellant and appellee both drank too much. There is no issue that appellee's ability to drive was impaired. There is no issue that appellant knew how much appellee had drunk.

Appellant, Keith Alan Roberts and appellee, Joey Horne, had been on drinking adventures on previous occasions. On this occasion, they each drank approximately five or six beers in two hours. They had knowledge of the other's reaction to alcohol. They were

together and observed each other for several hours. The wreck resulted from appellee's inability to operate his automobile safely. Appellant is chargeable with knowledge that it was not safe to ride with appellee. The trial court correctly ruled that appellant was contributorily negligent as a matter of law. The judgment of the trial court should be affirmed.

Respectfully submitted,



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